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No. 19

In the Supreme Court of the United States

OCTOBER TERM, 1929

ALEXANDER SPRUNT & SON, INC., ANDERSON, CLAYTON & CO., HOUSTON COMPRESS COMPANY ET AL., APPELLANTS

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ARKANSAS COTTON TRADE ASSOCIATION ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS

SUPPLEMENTAL BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

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This supplemental brief, submitted pursuant to leave of the Court, relates to a question which arose during the course of the oral argument herein October 31 and November 1, 1929, viz., whether, in view of the fact that the carriers against whom the order in question is directed did not appeal from the decree of the court below dismissing their bill

but acquiesced in the order by establishing the prescribed adjustment of rates, the appellants had the right to maintain this appeal.

In *Edward Hines Trustees* v. *United States,* 263 U. S. 143, suit was brought by a lumber concern to set aside as void an order of the Commission requiring carriers to cease and desist from collecting a certain penalty charge. The District Court sustained a motion of the United States to dismiss the bill on the ground that the plaintiffs had not shown such an interest in the subject matter as would entitle them to sue, and also for want of equity. The plaintiffs, who had not been parties to the proceedings before the Commission, contended that the order cancelling the penalty charge infringed their rights both as shippers and as prospective carriers.

This Court held that the mere fact that plaintiffs had not been parties to the proceedings in which the order was entered did not constitute a bar to the suit. "For it is brought to set aside an order alleged to be in excess of the Commission's power. *Interstate Commerce Commission* v. *Diffenbaugh,* 222 U. S. 42, 49; *Skinner & Eddy Corp.* v. *United States,* 249 U. S. 557." "But," the Court said, page 148, "plaintiffs could not maintain this suit merely by showing (if true) that the Commission was without power to order the penalty charges canceled. They must show also that the order alleged to be void subjects them to legal injury, actual or threatened. This they have wholly failed to do. It is not alleged that the carriers wish to impose

such charges and, but for the prohibition contained in the order, would do so. For aught that appears carriers are well satisfied with the order entered. Cancellation of a charge by which plaintiffs' rivals in business have been relieved of the handicap theretofore imposed may conceivably have subjected plaintiffs to such losses as are incident to more effective competition. But plaintiffs have no absolute right to require carriers to impose penalty charges. Compare *Interstate Commerce Commission* v. *Chicago, Rock Island & Pacific Ry. Co.*, 218 U. S. 88, 111. Plaintiffs' right is limited to protection against unjust discrimination. For discrimination redress must be sought by proceedings before the Commission. Its findings already made, and the order entered, negative such claim in this connection." And, as the plaintiffs did not show any interest which entitled them to sue, the Court had "no occasion to consider either the power of carriers to impose the penalty charge or the power of the Commission to order its cancellation," and affirmed the decree of the lower court.

In *United States* v. *Merchants &c. Assn.*, 242 U. S. 178, shippers at Sacramento and other inland cities in California sought to enjoin a permissive order of the Commission granting carriers partial relief from the long-and-short haul clause of Section 4 of the Interstate Commerce Act, as a result of which the rates to Sacramento and the other inland cities were increased. Representatives of the inland

cities brought suit in the District Court to restrain the enforcement as to them of the Commission's order, and of the tariffs filed thereunder. The bill alleged, among other things, that these cities had for a number of years enjoyed the same rates as San Francisco and Oakland; that large industries and other businesses had been established there because they enjoyed terminal rates; that their commercial importance and prosperity would be ruined if the rates were withdrawn; that no changed conditions existed justifying a withdrawal of terminal rates; that they had not been parties to the proceedings in which the orders were made; and that the "orders authorizing the withdrawal of terminal rates" from them were, among other things, "discriminatory and unjust, were made without said cities having their day in court or without giving them an opportunity to show the unreasonableness thereof, that no justification for such increase was shown, and the order of April 30, 1915, was without evidence, that petitioners have been denied the equal protection of the law and deprived of property without due process of law, to their irreparable damage."

This Court held that the action was not maintainable; that the plaintiffs had mistaken their remedy; and that if the rates made by tariffs filed under the authority granted seemed to them unreasonable, or unjustly discriminatory, Sections 13 and 15 of the Interstate Commerce Act afforded ample remedy.

In many respects the case at bar is like the *Hines case.* It is not alleged here that the carriers wish to maintain the two-rate plan under which the export rate would be higher than the domestic and, but for the prohibition contained in the order, would do so. Inasmuch as the carriers have not appealed from the decree of the court below dismissing their bill, and have complied with the order by establishing the equalized rates required by the Commission's order, it must be assumed that they are satisfied with the order entered.

There is nothing to show that the carriers would restore the two-rate plan in the event the Commission's order were annulled. It may be noted, however, that if the order were annulled and the previous order in *Galveston Commercial Asso.* v. *A. & V. Ry. Co.,* 77 I. C. C. 388, were allowed to stand, the carriers would, by force of the order therein, be compelled to restore the two-rate plan from Oklahoma, Arkansas, and Louisiana to the Gulf ports but not from Texas. This is so because the latter order is still in force except in so far as modified by the order entered in the proceedings at bar. But annulment of the order here would not necessarily have the effect of requiring the continuance in force of the order in the *Galveston Commercial Association Case,* and apparently it would be within the power of the Commission to vacate that order, leaving the carriers free either to continue the present one-rate plan or to restore the former two-rate plan. But in the event the carriers filed tariffs

with the Commission proposing to restore the two-rate plan, such tariffs would be subject to suspension and investigation under the provisions of Section 15 (7) of the Interstate Commerce Act.

In other respects the facts in the case at bar are different from those in the *Hines case*. Here, the appellants are required to pay the increased rate prescribed by the Commission's order for the purpose of removing the discrimination.

Skinner & Eddy Corp. v. *United States*, 249 U. S. 557, seems to be more analogous than the *Hines case*. In that case the shippers attacked the validity of a fourth-section order of the Commission. The defendants, the United States, the Commission, and 16 railroads, contended that the District Court did not have jurisdiction of the subject matter of the suit because orders entered in a fourth-section proceeding can not be assailed in the courts, at least not until after a remedy has been sought under Sections 13 and 15 of the Act to Regulate Commerce. The Court, overruling this contention, said (p. 562):

> This contention proceeds apparently upon a misapprehension of plaintiff's position. If plaintiff had sought relief against a rate or practice alleged to be unjust because unreasonably high or discriminatory, the remedy must have been sought primarily by proceedings before the Commission, *Loomis* v. *Lehigh Valley R. R. Co.*, 240 U. S. 43, 50; *Texas & Pacific Ry. Co.* v. *American Tie &*

Timber Co., 234 U. S. 138, 146; *The Minnesota Rate Cases*, 230 U. S. 352, 419; *Robinson* v. *Baltimore & Ohio R. R. Co.*, 222 U. S. 506; *Baltimore & Ohio R. R. Co.* v. *Pitcairn Coal Co.*, 215 U. S. 481; and the finding thereon would have been conclusive, unless there was lack of substantial evidence, some irregularity in the proceedings, or some error in the application of rules of law, *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 482; *Pennsylvania Co.* v. *United States*, 236 U. S. 351, 361; *Los Angeles Switching Case*, 234 U. S. 294, 311; *Kansas City Southern Ry. Co.* v. *United States*, 231 U. S. 423, 440; *Proctor & Gamble Co.* v. *United States*, 225 U. S. 282, 297-298; *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541. But plaintiff does not contend that 75 cents is an unreasonably high rate or that it is discriminatory or that there was mere error in the action of the Commission. The contention is that the Commission has exceeded its statutory powers; and that, hence, the order is void. In such a case the courts have jurisdiction of suits to enjoin the enforcement of an order, even if the plaintiff has not attempted to secure redress in a proceeding before the Commission. *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, 49; *Louisiana & Pacific Ry Co.* v. *United States*, 209 Fed. Rep. 244, 251; *Atlantic Coast Line R. R. Co.* v. *Interstate Commerce Commission*, 194 Fed. Rep. 449, 451. *The Sacramento Case, supra*, was a case of this character. Compare *Interstate Commerce*

Commission v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88, 92; *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U. S. 433. The District Court properly assumed jurisdiction of this suit.

This holding, it seems to us, points the way to a decision of the question here under consideration. If the real contention of the appellants is that the rates established as the result of the Commission's order are unjust because unreasonably high or discriminatory, they must seek redress by proceedings before the Commission. On the other hand, if their contention is that the Commission has exceeded its statutory powers and that hence the order is void, they appear to be entitled to maintain this action, provided they have shown that the order subjects them to legal injury.

In other cases it has been assumed, without discussion, that shippers may prosecute proceedings to determine the validity of orders of the Commission. *Western Chemical Co.* v. *United States*, 271 U. S. 268; *Nashville Ry.* v. *Tennessee*, 262 U. S. 318; *Assigned Car Cases*, 274 U. S. 564; *United States* v. *New River Co.*, 265 U. S. 533. Compare the opinion of the statutory District Court in *Anchor Coal Co.* v. *United States*, 25 F. (2d) 462, 478–479.

We contend that even if appellants do have the right to maintain this action, they are not entitled to any relief; because the order is not void for any of the reasons they urge, is within the statutory powers of the Commission, and is valid.

We submit that the holding in the *Sacramento Case, United States* v. *Merchants Assn., supra,* is applicable to the case at bar in so far as appellants' contention concerning the reasonableness *per se* of the equalized rates is concerned; that is, of the *level* of those rates. The Commission's order was one intended to remove discrimination. The level of the rates was not in issue. All parties to the proceedings, including appellants, understood this. Evidently appellants were satisfied with the level of the rates; for, although it was open to them at all times during the pendency of the proceedings to file a complaint with the Commission under Section 13 putting in issue the reasonableness of the level of the rates, they did not do so. That right is still open to them. That is their proper remedy if they now have any complaint because of the level of the equalized rates.

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